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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 1278

MARCEL FORT,

Petitioner,

vs.

THE CITY OF MIAMI,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

Petitioner prays that this Court grant rehearing of its Order of October 23, 1967 denying the petition for a writ of certiorari (Mr. Justice Stewart, with whom Mr. Justice Black and Mr. Justice Douglas joined, dissenting), 36 L.W. 3173, and that a writ of certiorari issue to review the judgment of the District Court of Appeal for the Third District of Florida in the above-entitled case as prayed for in the petition of April 12, 1967, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. RESPONDENT-CITY'S ARGUMENT THAT "CONFLICT-JURISDICTION" OF THE FLORIDA SUPREME COURT DEPRIVES THIS COURT OF JURISDICTION UNDER 28 U.S.C. §1257(3) BECAUSE PETITIONER FAILED TO EXHAUST HIS STATE REMEDIES (BRIEF OF RESPONDENT IN OPPOSITION, PP. 9-11) IS TANTAMOUNT TO A DENIAL OF DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

As Mr. Justice Brandeis wrote in **Brinkerhoff-Faris Trust & Savings Co. v. Hill**, 281 U.S. 673, 682, 50 S.Ct. 451, 454, 74 L.Ed. 1107, 1114:

> "* * * while it is for the state courts to determine the adjective as well as the substantive law of the state, they must in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

Or as stated in **Davis v. Wechsler**, 263 U.S. 22, 24, 44 S.Ct. 13, 14, 68 L.Ed. 143, 145:

"Whatever springes the state may set for those

> who are endeavoring to assert rights that the state confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

As more recently held by this Court in **NAACP v. Alabama**, 357 U.S. 449, 458, 78 S.Ct. 1163, 1169, 2 L.Ed 2d 1488, 1497:

> "Novelty in procedural requirements cannot be used to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights."

Petitioner did not avoid or evade review by the Florida Supreme Court, as implied by respondent, but instead sought full review of all three questions[1] presented to this Court (Petition for Certiorari, p. 3) in each and every state court available to petitioner (Petition for Certiorari, pp. 16-20)[2] and would have welcomed a favorable decision below.

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[1]Question 1 raises the unconstitutional application of the Miami Ordinance in that the statues are not obscene; Question 2 raises the unconstitutionality of the Miami Ordinance itself in limiting the test for obscenity solely to "appeal to prurient interest"; Question 3 raises the unconstitutionality of the Miami Ordinance both on its face and as applied in the case at bar in terms of prior restraint.

[2]The 44 pp. Brief of Appellant in the circuit court and the 39 pp. Brief of Petitioner in the district court of appeal, as well as the extensive oral arguments presented in both courts, were substantively (and in great part precisely) the same as the Petition for Certiorari filed in this Court insofar as the three Questions Presented and Arguments concerning Federal constitutional law (with the exception of cases decided after the briefs were filed). Respondent's 6 page brief in the circuit court cited only one case, Roth v. United States, 354 U. S. 476, 77 S.Ct. 1304, 1 L.Ed. 2d 1498. Respondent filed no brief in the district court of appeal.

Counsel would have particularly welcomed a favorable decision by the Florida Supreme Court, but was unable to reach said court in spite of all possible efforts made, under applicable Florida appellate jurisdictional law.

Although several aspects of Florida appellate law present difficulties even for highly able and conscientious counsel, the correct route to be taken at each step of the case at bar was explicitly and clearly set forth by the opinions of the Florida Supreme Court in the **Dresner v. City of Tallahassee** cases, Fla. 1961, 134 So. 2d 228 and Fla. 1964, 164 So. 2d 208. Counsel studied these "first" and "second" **Dresner** opinions of the highest court of the state repeatedly and in depth during the entire course of the case at bar.

In the first place, **direct appeal** from the trial court to the Florida Supreme Court is allowed only if (1) the trial court passes directly on the validity of a state statute, or (2) construes a controlling provision of the state or federal constitution, first **Dresner** opinion, 134 So. 2d at 228. In the case at bar no such direct appeal could be taken: as far as (1) above, the municipal court refused petitioner's request to pass upon the validity of the law under which petitioner was charged (Petition for Certiorari, 18, Transcript pp. 194-195) and "[f]or purposes of determining the jurisdiction of this [Florida Supreme] Court, a municipal ordinance cannot be classified as a state statute."[3] **Dresner,** 134 So. 2d at 229-230,

[3]The fortuitous circumstance of petitioner's arrest and conviction under the Miami Ordinance (City of Miami Code Ch. 43 §38) rather than under the Florida State Statute it adopts (Fla. St. §847.011) was not subject to modification by petitioner.

citing **Armstrong v. City of Tampa**, Fla. 1958, 106 So. 2d 407); as far as (2) above, the municipal court obviously did not construe any controlling state or federal constitutional provision (Petition for Certiorari, p. 18, Transcript, pp. 194-195, see also the **Armstrong** case, **supra**, distinguishing "construction" from "application", the municipal court having even refused to apply any constitutional provision in the case at bar!).[4]

In the second place, direct appeal from the circuit court to the Florida Supreme Court is allowed only if the circuit court (1) acts as a "trial court" and (2) construes (rather than applies) a controlling federal or state constitutional provision, second **Dresner** opinion, 164 So. 2d at 211. Neither of the two conditions was present in the case at bar, leastwise both as required by Florida law. The circuit court acted as an appellate court and its one sentence affirmance (Petition for Certiorari, App. B, Transcript, p. 202) construed **nothing.**

In the third place, the second **Dresner** opinion, 164 So. 2d 208 at 210 stated that appeal to the circuit court followed by a petition for common-law certiorari in the district court of appeal is the correct route to be taken when the "trial court" does not take action permitting direct appeal to the Florida Supreme Court. In the case at bar, petitioner clearly had to take this route, as he did, under Florida law.

In the fourth place, certiorari to the Florida Supreme Court following denial of common-law certiorari by the

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[4]Note also that it is *only "conceivably* [that] a municipal court could be considered as a 'trial court' ", Dresner, 134 So. 2d at 230.

district court of appeal is allowed only if one of three requirements is met: (1) if the district court of appeal's decision conflicts with a decision of another district court of appeal or of the Florida Supreme Court on the same point of law, (2) if the district court of appeal's decision initially construes a controlling federal or state constitutional provision, or (3) if the district court of appeal's decision initially passes upon the validity of a state statute, second **Dresner** opinion, 164 So. 2d at 212-213. In the case at bar, the district court of appeal's one sentence denial of certiorari (1) did not present the required "decisional conflict," as discussed previously, (2) did not construe **anything**, and (3) did not pass on the validity of the law under which petitioner was convicted, leastwise upon the validity of a state statute (rather than a municipal ordinance) as required by applicable law.

In **Callendar v. State**, Fla. 1956, 181 So. 2d 529 (the sole case cited by respondent in support of its "conflict jurisdiction" argument), the Florida Supreme Court reaffirmed the appellate jurisdictional law set forth in its second **Dresner** opinion, **supra**, and returned the mandates of **this** (United States Supreme) Court on the ground that the Florida Supreme Court had **no appeal or certiorari jurisdiction** to review the (First) district court of appeal's orders denying certiorari. **This** Court thereupon recalled its mandates, vacated its prior judgments, **granted certiorari to the Florida (First) district court of appeal**, and reversed its judgment, 383 U.S. 270, 86 S.Ct. 924, 15 L.Ed. 2d 749, after which the Florida district court of appeal complied therewith, Fla. App. 1966, 184 So. 2d 656.

Present-day use of the second **Dresner** opinion, 164 So. 2d 208, as well as the Florida (Second) district court of appeal's feelings toward the "dubious . . . honor" bestowed upon Florida district courts of appeal by the Florida Supreme Court in the **Dresner** case, may be found in **Awtrey v. City of St. Petersburg**, Fla. App. 1967, 193 So. 2d 468.

Petitioner could not in good faith have filed a petition for "conflict certiorari" in the Florida Supreme Court, accompanied by supporting portions of the record and a brief relating solely to jurisdiction, because research revealed **no** decision of another district court of appeal or of the Florida Supreme Court in direct conflict on the same point of law.[5]

Petitioner does not and cannot herein assert that the Florida appellate jurisdictional rules, though at times complex, deprive petitioner of due process of law. Petitioner does and must reassert his total (though unsuccessful) exhaustion of state remedies as enunciated by the Florida Supreme Court in the **Dresner** opinions, **supra**, and his consequent proper invocation of certiorari review by this court.

Whether respondent's fallacious "conflict jurisdiction" argument reflects unfamiliarity with controlling

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[5]Florida Appellate Rule 4.5c(6), as amended, and effective during the case at bar (printed in toto in Appendix A, infra), requires the petition for "conflict certiorari" to be accompanied by those parts of the record and a brief "relating only to jurisdiction of the [Florida Supreme] Court." Until and unless certiorari is granted on the *jurisdictional* record and briefs, no party may present argument, in briefs or otherwise, "on the merits of the petition."

Florida law or instead "overzealousness" sometimes overtaking state and city attorneys is unknown to petitioner and irrelevant. In view of (1) the **Dresner** opinions, **supra,** (2) respondent's failure to cite any case whatsoever yielding the required "decisional-conflict," (3) petitioner's inability to locate such a case, and (4) apparent reliance by at least one member of this Court on respondent's jurisdictional argument, petitioner is compelled to assert that respondent has unjustifiably, but successfully,* challenged petitioner's right to certiorari review of the judgment below by this Court, review of significant constitutional questions (or of any one of them) raised by petitioner's criminal trial, conviction and sentence.

Petitioner had no "real opportunity" to secure Florida Supreme Court review of the case at bar, see **Brinkerhoff-Faris Trust & Savings Co. v. Hill, supra.** Respondent's "springes . . . under the name of local practice" must not be permitted to defeat petitioner's appropriate reliance on Federal Constitutional rights, **Davis v. Wechsler, supra.** Having justifiably relied upon the **Dresner** opinions, **supra,** and having properly sought "vindication in state courts of . . . [his] federal constitutional rights," petitioner must characterize as a denial of due process of law respondent's evidently successful use of "[n]ovelty in procedural requirements . . . to thwart review in this Court . . . ," **NAACP v. Alabama, supra.** Petitioner has exhausted his state remedies; three levels of Florida

*In both Tralins vs. Gerstein, 378 U.S. 576, 84 S.Ct. 1903, 12 L.Ed. 2d 1033, and Grove Press v. Gerstein, 378 U.S. 577, 84 S.Ct. 1909, 12 L.Ed. 2d 1035, this Court granted certiorari and summarily reversed the judgments below in spite of respondent-State Attorney's Briefs in Opposition raising similarly fallacious failure-to-exhaust-state-remedies-arguments, arguments thus not being prejudicial to petitioners, unlike in the case at bar.

courts is "enough," even if the respondent should "dissent."

2. PETITIONER HAS A CONSTITUTIONAL RIGHT NOT TO BE TRIED, CONVICTED, AND SENTENCED UNDER AN UNCONSTITUTIONAL CITY ORDINANCE DEFINING OBSCENITY SOLELY IN TERMS OF THE "APPEAL TO PRURIENT INTEREST" TEST, A CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW INVOLVED IN QUESTION 2 PRESENTED BY THE PETITION FOR CERTIORARI, (PP. 3, 25-27)[6] AND A CONSTITUTIONAL RIGHT TOTALLY INDEPENDENT OF THE STATUES' OBSCENITY OR LACK THEREOF.

Even if petitioner's statues are **not** entitled to the constitutional protection extended to freedom of expression,[7] nevertheless, petitioner is entitled to prosecution and conviction for knowingly-offering-obscene-

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[6]While challenging the Miami Ordinance's constitutionality in this respect in the Petition, petitioner did not then or in his reply brief urge *the due-process-denial* resulting from his conviction, etc. under an unconstitutional ordinance. Such substantial ground for reversal of the judgment below was not previously argued herein, though available to petitioner.

[7]If a majority of this Court deems the statues obscene or deems their setting evidence of pandering, the statutes are not entitled to the "free-speech" guarantees of the First and Fourteenth Amendments (c.f. Question 1, P. 3, 20-25). This Court's decisions in Potomac News Co. v. United States, 36 L.W. 3170 (#164), Central Magazine Sales Ltd. v. United States, 36 L.W. 3170 (#368), and Conner v. City of Hammond, 36 L.W. 3170 (#259), all three handed down the same day as denial of certiorari in the case at bar, and all three granting certiorari and summarily reversing the judgments below on the sole ground of lack of obscenity of the material involved (i.e., all three citing Redrup v. New York, ... U.S. ....., ... S.Ct. ....., 18 L.Ed. 2d 515), suggest a possible opinion held by a majority of this Court to the effect that the statues in the case at bar are obscene.

statues-for-sale-in-his-backyard under a constitutional law. "Due process of law" does not permit an arrest, trial, conviction, fine (or 40 days' imprisonment) and imminent destruction of personal property on the basis of a constitutionally invalid city ordinance. "Justice under law" does not permit criminal prosecution and punishment under an unconstitutional law—no matter how obscene the material upon which the criminal action is based. Conviction by "kangaroo court" or under unconstitutional ordinance is equally abhorrent to our system of justice.

As stated by Mr. Justice Fortas **In the Matter of the Application of Gault**, ___ U.S. ___, 35 L. W. 4399, 4405:

> "Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social contract which defines the rights of the individual and delineates the powers which the State may exercise."

Assuming arguendo that the statues are obscene in themselves or in their setting, nevertheless such opinion does not in one whit diminish the vital significance of the second question presented, namely, the constitutionality of the Miami Ordinance with its exclusive "appeal to prurient interest" test for determining obscenity.[8]

Petitioner challenged the constitutionality of the Miami Ordinance, under which criminal proceedings against him were successfully brought and prosecuted from his

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[8] A fortiori, the Miami Ordinance excludes the "patently offensive" and "utterly without redeeming social importance" tests.

arrest on August 11, 1965 to date, throughout three Florida trial and appellate courts, petitioner actively pursued and exhausted his state remedies without any specific judicial ruling on the constitutional sufficiency of the exclusive "appeal to prurient interest" test, leastwise a favorable one,[9] and petitioner made timely request of this Court to grant certiorari and reverse the judgment below on the ground, inter alia, of unconstitutionality of the Miami penal Ordinance.[10] It does not seem unreasonable to expect that petitioner's constitutional right to due process of law includes an authoritative ruling by this Court upon the constitutional validity of the Miami Ordinance in view of opinions of various Justices of this Court in Jacobellis v. Ohio, 378 U.S. 184, 84 S. Ct. 1676, 12 L.Ed.

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[9]See detailed exposition of proceedings below in the prior "reason" concerning respondent's fallacious "conflict-jurisdiction" argument, supra.

[10]Counsel for petitioner in the case at bar also participated in the Tralins v. Gerstein and Grove Press v. Gerstein cases, supra, and were instrumental in the eventual decision to attack the banning of "Pleasure Was My Business" and "Tropic of Cancer" on grounds *not* involving the unconstitutionality of the state statute since the statute complied with the then-existing law as set forth in Roth v. United States, supra. This Court's opinions in Jacobellis v. Ohio, 378 U.S. 184, 84 S. Ct. 1676, 12 L.Ed. 2d 793, Memoirs v. Massachusetts, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed. 2d 1, Mishkin v. New York, 383 U.S. 502, 86 S.Ct. 958, 16 L.Ed. 2d 56, Ginzburg v. United States, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed. 2d 31, revealed significant post-Roth changes. Consequently, petitioner in the case at bar challenged the constitutionality of the "appeal-to-prurient-interest" test set forth in the Miami Ordinance at the earliest possible moment, i.e., at trial herein. Petitioner cited Jacobellis v. Ohio as well as Roth v. United States to all three Florida courts involved, and petitioner relied on the Memoirs, Mishkin and Ginzburg language as soon as the opinions were handed down on March 21, 1966, including these three cases in the brief and oral argument before the Florida district court of appeal.

2d 793, and "the prevailing opinion by Mr. Justice Brennan" in **Memoirs v. Massachusetts**, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed. 2d 1.[11]

Petitioner respectfully suggests that the question involved is important enough that fourteen more separate opinions[12] explaining the present positions taken by the Justices of this Court on the proper constitutional tests for determining obscenity is preferable to silence on the issue.

The entire problem of obscenity and constitutional law, freedom of the individual and societal standards of decency, artistic expression and public morality, etc., may indeed not be capable of solution today or in the near future, no matter how much time, energy and skill this Court, other courts, legislatures, executives, scholars, and citizens, etc. expend. But this Court may aid in solution of the problem by opinions setting forth relevant scientific, sociological and legal information, analysis, and conclusions.

Petitioner respectfully urges that this Court reconsider "coming to grips"[13] with the issue of his criminal conviction under the Miami Ordinance defining obscenity only in terms of "appeal to prurient interest."

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[11]See Dissenting Opinion in the case at bar, fn. 4.

[12]See *Ginzburg v. U. S.*, supra, 383 U.S. at 480, 481, 86 S.Ct. at 952, 16 L.Ed. 2d at 44 (dissenting opinion of Mr. Justice Black)

[13]Redrup v. United States, ... U.S. ....., ... S.Ct. ....., 18 L.Ed. 2d 515. (dissenting opinion of Mr. Justice Harlan).

3. A NEW FLORIDA STATE OBSCENITY STATUTE[14] EFFECTIVE OCTOBER 1, 1967, PROHIBITS THE KNOWING POSSESSION OF OBSCENE STATUES FOR SALE TO ANYONE UNDER 18 AS WELL AS THE SHOWING OF SUCH MATERIAL TO SUCH PERSON, AND SETS FORTH NO "APPEAL TO PRURIENT INTEREST" TEST FOR DETERMINING OBSCENITY, SUCH NEW STATUTE BEING AN INTERVENING CIRCUMSTANCE OF SUBSTANTIAL EFFECT IN THE CASE AT BAR.

Since the new statute (unlike the Miami Ordinance adopting Fla.Stat. §847.011, subsection 10, involved in the case at bar) does not include an "appeal to prurient interest" test for defining "obscene," favorable action upon petitioner's request for a holding by this Court that the Miami Ordinance is unconstitutional (Question 2, Petition for Certiorari, pp. 3, 25-27) would NOW leave the State of Florida free to proceed under the new statute. Since the new statute, unlike the Miami Ordinance, contains no "appeal to prurient interest" test for determining what is "obscene," the new statute permits the Florida Courts to apply all tests required by this Court's present decisions (i.e., the "appeal to prurient interest," "customary candor," and "redeeming social importance" tests (**Memoirs v. Massachusetts, supra**) or by this Court's future decisions, an application expressly forbidden the municipal court in the case at bar by the Miami Ordinance.

Petitioner cannot and does not, at this posture of this case, take a position on the constitutionality of the new

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[14]Printed in toto in Appendix B: Chapter 67-153 (Florida Session Law Service suppl. Fla. Stat. Ann. [1967, No. 2], "Laws 1967-41st Regular Legislative Session," pp. 233-235.

statute. But petitioner can state that the new statute permits a determination of what is "obscene" under whatever constitutional tests are set forth in this Court's opinions now or hereafter, and would avoid the issue presented by Question 2 in the case at bar.

CONCLUSION

For the reasons set forth above (as well as in the Petition for Certiorari and Petitioner's Reply to Response heretofore filed), it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the District Court of Appeal for the Third District of Florida.

Respectfully submitted,

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CERTIFICATE OF GOOD FAITH

I HEREBY CERTIFY that the foregoing Petition for Rehearing is presented in good faith and not for delay, and further certify that the Petition for Rehearing is restricted to the grounds specified in Rule 58 of the Rules of this Court.

IRMA ROBBINS FEDER
RICHARD YALE FEDER
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I, IRMA ROBBINS FEDER, Counsel for Petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that on November 13, 1967, I served copies of the foregoing Petition for Rehearing on the Respondent by mailing a copy thereof in a duly addressed envelope to JACK R. RICE, City Attorney, attention JOHN G. THOMAS and/or JOHN LLOYD, Assistant City Attorneys, 65 S.W. 1st Street, Miami, Florida 33130.

IRMA ROBBINS FEDER
Attorney for Petitioner